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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WILLIAM POWERS, JR. et al., Plaintiffs and Appellants, v. DENISE EMERSON et al., Defendants and Respondents.	2d Civ. No. B286125 (Super. Ct. No. 16CVP-0115) (San Luis Obispo County)

This is the fourth appeal in an ongoing dispute between William Powers, Jr., William H. Powers III and Lindsey Keyes (collectively "plaintiffs") and their neighbors, Denise and Philip Emerson (collectively "defendants"). (See *Emerson v. Powers* (Nov. 26, 2018, B284650) [nonpub. opn.]; *Powers v. Emerson* (Dec. 20, 2017, B280286) [nonpub. opn.]; *Emerson v. Powers* (Dec. 20, 2016, B269529) [nonpub. opn.].) Each of the prior appeals was resolved against one or more of the plaintiffs.

In this appeal, plaintiffs challenge the trial court's order denying their motion for reconsideration of the August 1, 2017[1] minute order sustaining defendants' demurrer to plaintiffs' third amended complaint (TAC) without leave to amend. Because neither the order denying the motion for reconsideration nor the underlying minute order is appealable, we dismiss the appeal.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, who are appearing in propria persona, filed their original complaint in 2016. After a series of demurrers and amendments, plaintiffs filed the TAC, which alleged claims against defendants for civil harassment and stalking, false arrest, invasion of privacy, assault with a deadly weapon, intentional violation of civil rights, intentional damage to real property, elder and dependent adult abuse, intentional infliction of emotional distress, trespass and private nuisance.

On June 29, the trial court held an evidentiary hearing to resolve plaintiffs' request for a preliminary injunction in this case and Denise Emerson's request for a civil harassment restraining order against William Powers III in a related case (No. 15CVP-0299). No court reporter was present, but the record reflects that "[o]pening statements were made, briefs were filed, witnesses testified, exhibits were submitted and closing arguments were presented."

On July 24, the trial court issued an order denying plaintiffs' request for a preliminary injunction and granting Denise Emerson's request for an order restraining William

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[1] All relevant dates are in 2017 unless otherwise stated.

[2] Plaintiffs also appealed the trial court's December 7 order denying their motion to use a settled statement in this appeal. Plaintiffs have voluntarily abandoned that appeal.

Powers III from harassing, molesting and annoying defendants. The court found nine corroborated instances of harassment, primarily involving the playing of loud and annoying music. William Powers III appealed, claiming the restraining order was not supported by substantial evidence. In the absence of an evidentiary record, we affirmed the order. (*Emerson v. Powers*, *supra*, B284650.)

In demurring to the TAC, defendants argued, based on the July 24 order, that plaintiffs' entire action is barred by the doctrines of issue preclusion and res judicata. The trial court agreed. In a minute order dated August 1, the court sustained the demurrer without leave to amend and denied plaintiffs' motion for leave to file a fourth amended complaint. It stated: "All of the facts alleged in support of Plaintiffs' causes of action in the TAC have now been fully litigated. The Court essentially determined there was no merit to any of the allegations such that Plaintiffs are now collaterally estopped from proceeding with this action. 'Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.' (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) The issues decided in the preliminary injunction motion are identical to those at issue in this demurrer; the issues were actually litigated and decided on the merits; and the parties against whom preclusion is sought in this action are the same or in privity with the parties in the prior proceeding."

On August 10, plaintiffs moved under Code of Civil Procedure section 1008, subdivision (a)[3] for reconsideration of the August 1 order sustaining the demurrer to the TAC. Six days later, the trial court entered a "judgment of dismissal after

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[3] All further statutory references are to the Code of Civil Procedure.

sustaining of demurrer to third amended complaint without leave to amend." (All caps. omitted.) Defendants filed and served a notice of entry of judgment on August 21.

On October 18, the trial court denied plaintiffs' "motion to reconsider the Court's August 1, 2017 order sustaining the demurrer." The court found that "no new facts, circumstances or law are presented to allow for the Court's reconsideration of its ruling."

The last day to file a notice of appeal from the judgment of dismissal was October 20. On November 2, plaintiffs filed a notice of appeal from the order denying the motion for reconsideration of the August 1 order.

DISCUSSION

Plaintiffs contend the trial court committed reversible error by disregarding the standard legally applicable to demurrers, by sustaining the demurrer to two causes of action that had previously survived demurrer, and by denying plaintiffs' request for further leave to amend. Defendants respond that these issues are not properly before us because plaintiffs failed to file a timely appeal from an appealable order or judgment. We agree with defendants.

"An appealable judgment or order is essential to appellate jurisdiction . . . ." (*Winter v. Rice* (1986) 176 Cal.App.3d 679, 681.) Plaintiffs' notice of appeal is from the trial court's October 18 order denying their motion for reconsideration of the August 1 minute order sustaining the demurrer to the TAC without leave to amend. As recognized in *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, "[a]n order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order." (*Id.* at p. 1396; accord *Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1189

(*Thompson*); *Vibert v. Berger* (1966) 64 Cal.2d 65, 67 ["our courts have held it to be 'hornbook law that [an] order sustaining a demurrer is interlocutory, is not appealable, and that the appeal must be taken from the subsequently entered judgment'"].)

An order denying a motion for reconsideration under section 1008, subdivision (a) also is not an appealable order. (*Id.*, subd. (g); *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576-1577 (*Powell*); *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1550, fn. 2.) The only exception is if the motion is taken from an appealable order. (§ 1008, subd. (g).) In that case, the order denying the motion for reconsideration is reviewable through the appealable order or judgment, but only if the notice of appeal from the order or judgment is timely. (*Ibid.* ["if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order"]; *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 871 ["denial of [a] motion for reconsideration [is] not appealable but [is] reviewable on [a] timely appeal of the underlying order"].)

These authorities confirm that neither the August 1 minute order sustaining the demurrer nor the October 18 order denying the motion for reconsideration of the August 1 order is appealable. (See § 1008, subd. (g); *Thompson*, *supra*, 11 Cal.App.5th at p. 1189; *Powell*, *supra*, 197 Cal.App.4th at pp. 1576-1577.) The only appealable order arising from the sustaining of the demurrer is the judgment of dismissal entered on August 16. (*Thompson*, at p. 1189.) Defendants served notice of entry of the judgment on August 21, thereby triggering the 60-day deadline in which to file an appeal. (Cal. Rules of Ct., rule

8.104, subd. (a)(1)(B).)[4] It is undisputed that plaintiffs did not file a notice of appeal by the October 20 deadline.

Plaintiffs maintain their notice of appeal was timely under Rule 8.108(e), which provides: "If any party serves and files a valid motion to reconsider an *appealable order* under . . . section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first motion to reconsider is filed; or [¶] (3) 180 days after entry of the appealable order." (Italics added.) Plaintiffs assert that "of the three dates to which the time to appeal was extended under Rule 8.108(e), the earliest was November 8, 2017, 90 days after August 10, 2017, when the first (only) [motion for reconsideration] was filed as to the August 1, 2017 order being appealed." Since their notice of appeal was filed on November 2, they claim the appeal was timely.

Plaintiffs' analysis is incorrect. Rule 8.108(e) applies only when the motion for reconsideration is filed from an "appealable order." As previously discussed, the August 1 minute order sustaining the demurrer is not an appealable order. (See *Thompson*, *supra*, 11 Cal.App.5th at p. 1189; *Sisemore v. Master Financial, Inc.*, *supra*, 151 Cal.App.4th at p. 1396.) Given that plaintiffs did not seek reconsideration of the appealable order, i.e., the judgment of dismissal, the time to appeal from that judgment was not extended under Rule 8.108(e). In the absence of a proper and timely notice of appeal from an appealable order or judgment, we are without jurisdiction to determine the merits

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[4] All subsequent rule references are to the California Rules of Court.

of the appeal and must dismiss. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.)

DISPOSITION

The appeal from the trial court's order denying plaintiffs' motion for reconsideration of the prejudgment order sustaining defendants' demurrer to the TAC without leave to amend is dismissed. The appeal from the court's order denying plaintiffs' motion to use a settled statement is dismissed as abandoned.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Roger T. Picquet, Judge
Superior Court County of San Luis Obispo

William H. Powers, Jr., William Powers III and Lindsey Keyes, in pro. per, for Plaintiffs and Appellants.

Bentler Mulder, and Christopher Mulder, for Defendants and Respondents.